CONGRESS OF THE UNITED STATES

House of Representatives

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SUBCOMMITTEE ON ELECTIONS HEARING

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Thursday, December 4, 2007, 11:00 a.m.

OVERSIGHT HEARING ON USE OF "ROBOCALLS" IN FEDERAL CAMPAIGNS

TESTIMONY OF WILLIAM E. RANEY

COUNSEL TO AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS

COPILEVITZ & CANTER, LLC
310 W. 20TH Street, Suite 300
Kansas City, Missouri 64108
816-472-9000
816-472-5000 (fax)
braney@cckc-law.com

As federal elections approach, a combination of technology and money will fuel an unprecedented number of telephone calls to be placed in the coming year for individual candidates and issues.

This Subcommittee has invited me to testify regarding the use of "robocalls" in political campaigns. These are prerecorded messages sent to voters by or on behalf of candidates concerning ballot issues.

I am a partner at the law firm of Copilevitz & Canter, LLC in Kansas City, Missouri. I have more than a decade of experience in this field. My practice includes commercial

telemarketing, charitable fundraising, and all applications of prerecorded telephone calls. Today I appear as counsel for the American Association of Political Consultants (AAPC), an organization with members providing services to both Democrats and Republicans. I urge this Committee to take action so that legitimate uses of this technology, with regard to elections, are protected. While the AAPC encourages self-regulatory standards for its members, Congress can set a uniform standard to ensure that all political calls meet a similar level of professionalism and ethical responsibility.

I. HISTORICAL USE

Historically, an "autodialer" could place a telephone call to a sequential or random list of telephone numbers and deliver a low fidelity message if a consumer answered the phone. This mechanical technology has been available for decades, but in the past often malfunctioned, delivering cut off messages to answering machines, "seizing" telephone lines, and failing to communicate effectively with consumers. The first federal legislative response to these calls was the Telephone Consumer Protection Act of 1991 ("TCPA") which bans prerecorded calls - absent express consent - to cell phones, emergency and public safety numbers, and requires some minimal disclosure as to the caller's identity and telephone number. Several states responded to this crude technology as well with bans on prerecorded calls or other restrictions.

These laws nearly uniformly addressed commercial uses of prerecorded calls. If applicable to political calls, these laws would group political calls in the same category as "telemarketing"- not a good fit.

The technology has changed in massive and important ways in the past decade, and Congress now faces new challenges, not met by existing laws.

First, these calls are no longer sent by a mechanical dialer and tape player, but sophisticated hardware and software, which allow a specific database of phone numbers to be

contacted, quickly and cheaply. These dialers no longer call cell phones or public safety lines (absent express consent).

Second, the software now allows different messages to be played (some interactive) based on whether a live consumer or an answering machine picks up the call.

Third, Caller ID allows the identity of the caller to be quickly and accurately disclosed. The AAPC believes there is no room for deceptive or abusive practices – ("dirty tricks") with regard to these calls and urges a legislative response to require disclosure and prevent deception.

II. EFFECTS OF TECHNOLOGY ON VOTERS

The professionals at AAPC think this technology is a valuable tool, among several, to get their candidates' message to voters. The candidates and officials the AAPC represents overwhelmingly recognize the potential value of this tool. Many elected officials use some aspects of this technology for franked communications, as well, including telephone "town halls". I think this medium is worth protecting both from misuse and an inappropriate legislative response. The First Amendment mandates that more speech, not less, is better for society.

Politicians can use these messages in many ways beyond simple "get out the vote" calls. Tests regarding prerecorded political calls are inconclusive regarding their effect on voter turnout. The only public test on prerecorded call effectiveness is from Gerber and Green at Yale[1]. Their work is not encouraging solely on the overall effectiveness of "get out the vote" calls but it does not consider the collective positive set of uses- voter education, issue calls, get out the vote, voter registration, fundraising, volunteer mobilization, etc. Candidates embrace this medium because they think it works and it is a core aspect of free speech that speakers know best what they want to say and how they want to say it.

Polling of voters has shown telephone calls have some effect on voters' impressions of candidates. In the Jim Webb for Senate campaign 3% of voters said phone calls were the "most"

[1] http://poq.oxfordjournals.org/cgi/content/citation/65/1/75

important form of information they received; 6% said radio ads were the most important form of information; 8% attributed campaign mail with being the most important form of information, and 37% said television was the most important form of information received. http://www.campaignsandelections.com/webedition/page.cfm?pageid=288&navid=52

It is a well-settled maxim of constitutional law that speakers know best what they want to say and how they want to say it. The AAPC expresses this view here: Prerecorded calls are an inexpensive and effective way - sometimes the only way - for a voter to hear the words of a candidate, in the voice of that candidate or an interested citizen, without expensive technology or time investment (e.g. watching a full debate). On issue votes, prerecorded calls are a great tool for voter education. They could, for example, provide a web link to a consumer for further research.

III. PAST PROBLEMS WITH CALLS

Because prerecorded calls are inexpensive and result in nearly instantaneous delivery of messages to consumers' telephone lines, there is potential for abuse, such as deception, misinformation, and other "dirty tricks".

Just last November, a New Hampshire Congressional race was marred by negative prerecorded calls that did not disclose promptly the identity of the caller, thus resulting in massive negative feedback to a candidate. ["Repeat calls not from Hodes …" Concord Monitor, November 5, 2006.]

http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20061105/REPOSITORY/611050397.

Deceptive calls can be used to easily misinform voters with little likelihood of monetary TCPA enforcement.

At other times, prerecorded political calls have been sent, sometimes by mistake, at odd hours. Three thousand calls were sent to voters, including the candidate, at 2 a.m. instead of 2

p.m. during a recent campaign in Peekskill, New York. "Rude Awakenings", Kansas City Star, Nov. 3, 2007, p. A3.

IV. LEGISLATIVE RESPONSE

The TCPA requires that all prerecorded calls put at the beginning of the message and state clearly "the identity of the business, individual, or other entity that is responsible for initiating the call" and "during or after the message, state clearly the telephone number of . . . such business. . .". 47 C.F.R. § 64.1200(b). A person or entity who receives a call that does not make this disclosure may bring an action in state court for actual monetary loss or $500 (whichever is greater). This amount can be trebled for knowing or willful violations. 47 U.S.C. § 227(b)(3). Even with Congress' action enacting the TCPA, some doubt that it applies to political prerecorded calls.

Given the size of prerecorded telemarketing campaigns (which very quickly can call thousands of numbers), the potential monetary damage of calls which do not make this disclosure is catastrophic.

The TCPA has also been approved for use in class action cases, potentially exposing senders' messages that do not contain this disclosure to catastrophic liability.

Attached as Exhibit A is a memorandum summarizing existing federal and state law which regulates prerecorded political calls. Some states ban these calls entirely, but most states allow them. Of the states which ban prerecorded calls, several would allow calls if there is a relationship between the caller and the consumer (e.g. prior donation, etc.).

In the immediate past legislative session, many states considered bills specifically regulating prerecorded political calls. With the exception of Oregon, these laws were not adopted. The bills fell into two categories:

1. Banning prerecorded political calls, and

2. Banning prerecorded political calls to persons whose names were included on the state or federal "do-not-call" list.

Each of these legislative responses bans legitimate speech without regard for the negative effect of banning a particular call. In the First Amendment setting, the AAPC and I personally believe a narrow legislative response, banning misrepresentations, better serves consumers' needs than an outright ban.

Additionally, the second option above confuses "do-not-call" lists, which were intended for commercial telemarketing calls, with advocacy and "fully protected" election speech activities, and forces a consumer to make a choice between receiving no calls (commercial or political) and every call (telemarketing calls included).

There is a need for Congress to provide a uniform solution to the problem of deceptive or abusive prerecorded messages by expressly preempting conflicting state law.

The Supreme Court has held that:

> the Federal Government holds a decided advantage in this delicate balance [between the states and federal government]: the Supremacy Clause and as long as it (Congress) is acting within the powers granted it under the Constitution, Congress may impose its will on the States.

Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

> [W]hen Congress has 'unmistakably… ordained,' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. . .

[Citations omitted]. Id.

Further, there is a longstanding tradition of exclusive federal law jurisdiction over interstate telephony. According to AAPC membership, the vast majority of these telephone calls are interstate.

Based on this authority and need, Congress should pass legislation in the best interests of consumers, regulators, and speech in general, imposing uniform rules that are enforceable by federal, state, and private persons, for political prerecorded telephone calls.

V. CONCLUSION

The Subcommittee has a unique opportunity to both reduce consumer confusion and improve voter participation by crafting an appropriate legislative response that recognizes the importance of this medium and protects legitimate speakers and candidates.

The AAPC believes that this response should include the following:

1. A rule requiring responsible prerecorded disclosures identifying the sender of calls and a telephone number of that sender for all political calls before the end of the call;
2. Preempting contradictory state law;
3. Allowing call recipients to opt out of future calls from that campaign, candidate or organization;
4. Requiring caller ID to be projected for every call;
5. Restricting calls to normal times of day (i.e. 8:00 a.m. to 9:00 p.m.);
6. Prohibiting misrepresentations or deception of any sort with regard to political issues.

Thank you for your consideration.

William E. Raney

APPENDIX I

Exhibit A

Memo re: Existing Prerecorded Call Laws Affecting Political Calls

Exhibit B

Citations - TCPA & Regulations

47 U.S.C. § 227

47 C.F.R. § 64.1200

Exhibit C

Contact Information:

Anthony Bellotti
The American Association of Political Consultants
600 Pennsylvania Avenue, SE
Suite 330
Washington, D.C. 20003
abellotti@theaapc.org

William Raney
Copilevitz & Canter, LLC
310 W. 20th Street, Suite 300
Kansas City, Missouri 64108
816-472-9000
816-472-5000 (fax)
braney@cckc-law.com